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Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights

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1. Introduction

Most liberal thinkers and human rights advocates are likely to suggest that judicial activism plays a pivotal role in the substantiation of rights. It is often presumed that ‘activist’ courts lead to greater promotion of human rights, both civil and political and socioeconomic. This presumption is certainly compelling in the realm of civil and political rights. Yet the role of judges, and indeed the extent of their activism in matters relating to economic, social and cultural (ESC) rights, requires further reflection.

Following the conclusion of military operations in Sri Lanka in 2009, the issue of economic development and distributive justice appears to have remerged on the country’s agenda. Within this post-conflict context, the judiciary in Sri Lanka is confronted with a major challenge in terms of defining its proper role in the promotion of ESC rights. The precise approach that ought to be adopted remains debatable and highly contentious, as the underlined social and political injustices—of which the ethnic conflict was symptomatic—are far from being resolved.

Contemporary human rights jurisprudence suggests parity between civil and political rights and ESC rights, and describes the two sets of rights as ‘universal, indivisible and interdependent and interrelated.’ Despite this position, there remains deep and often debilitating disagreement over the proper status of ESC rights and the nature of States’ obligations towards their fulfillment. At one end of the spectrum lies the view that ESC rights are more important than civil and political rights, as no hungry, illiterate or homeless individual cares much for her

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1 See UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5. The paragraph in its entirety reads: ‘All human rights are universal, indivisible and interdependent and interrelated.’

right to vote or her freedom of association. At the other end of the spectrum, it is contended that ESC rights should not be treated as ‘rights’ *per se*, since such treatment ‘undermines the enjoyment of individual freedom, distorts the functioning of free markets…and provides an excuse to downgrade the importance of civil and political rights.’

This paper proceeds on the premise that States do in fact have an inescapable obligation to protect, respect and promote ESC rights. However, it is conceded that this obligation is more complex than its counterpart in respect of civil and political rights. The former obligation is fulfilled within the context of scarce resources, and therefore within a framework of ‘progressive realization’. Thus the precise roles of various organs of government in substantiating ESC rights depend on a number of features unique to this particular set of rights.

An important debate has therefore emerged on what role judges ought to play in enforcing ESC rights. The author uses the term ‘judicial activism’ in the broadest sense possible, signifying the intent of judges to intervene in the political or policymaking process in order to enforce rights. In this paper, the author will attempt to examine the general criticism of the justiciability of ESC rights, and the desirability of judicial activism in the fulfillment of such rights. The author will, thereafter, focus on the concepts of ‘queue jumping’ and ‘trade-offs’, and their complex relationship to both socioeconomic policymaking and resource allocation. In conclusion, the author proposes certain key parameters within which judges should adjudicate on ESC rights issues, thereby defining the extent to which judicial activism is appropriate in this sphere.

### 2. The Nature of States’ Obligations

The Committee on Economic, Social and Cultural Rights, through its General Comments, has clarified the nature of States’ obligations towards the fulfillment of ESC rights. Before delving into the issue of justiciability, there may be some value in briefly discussing the Committee’s observations.

In General Comment No. 3, the Committee describes the nature of the general legal obligations undertaken by State parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). These obligations include both obligations of ‘conduct’ and obligations of ‘result’. The Committee also opined

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4 See the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) Art. 2. The Article reads: ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively (emphasis added) the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’
that amongst the main obligations imposed on states, two undertakings are of significance: first, the ‘undertaking to guarantee’ that relevant rights ‘will be exercised without discrimination, and second, the undertaking ‘to take steps’. The means by which the obligation ‘to take steps’ is satisfied include ‘all appropriate means, including particularly the adoption of legislative measures.’ The Committee thus recognized ‘that in many instances legislation is highly desirable and even indispensable.’ However, it was contended that the adoption of legislative measures is by no means exhaustive. Other measures considered appropriate in this regard include administrative, financial, educational and social measures.

The Committee also expounded upon the concept of ‘progressive realization’, which ‘constitutes a recognition of the fact that full realization of all [ESC] rights will generally not be able to be achieved in a short period of time.’ Crucially, the Committee noted that the phrase ‘progressive realization’ should be interpreted purposefully in the light of the raison d’être of the Covenant, which is ‘to establish clear obligations…in respect of the full realization of the rights in question.’ The Committee thus insisted that each State party had a minimum core obligation in respect of each Covenant right, having taken resource constraints into account.

This General Comment thus clarifies the nature of States’ minimum core obligations in respect of the ESC rights, particularly in relation to the availability of limited resources. There is also some indication as to the types of measures that ought to be adopted by States to bring about the progressive realization of these rights. However, the question remains as to whether such measures should include

Schaffer, ‘Less is More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’, 56 Hastings L.J. (2005) 217, at 253. Abramovich and Courtis challenge the conception of ESC rights as ‘positive rights’ and insist that ESC rights demand ‘not only affirmative actions to guarantee and promote, but also require that the state to respect and protect.’ Citing the example of the right to food, the authors argue that states must not ‘expropriate lands from a community whose sustenance depends principally or entirely upon access to that resource, without taking appropriate alternative measures. The State’s obligation to protect rights includes the obligation to ensure that individuals are not deprived-for example, by the actions of third parties, such as dominant economic groups—of the basic resources such as access to land, water, or the labor market, which are necessary to satisfy their need for food.’ This connotes a ‘negative right’ feature within the right to food. Thus Abramovich and Courtis conclude that any argument suggesting that ESC rights are merely ‘positive rights’ to be fulfilled at the discretion of the state is a fallacy.

1 Ibid. paras.1 and 2.
2 ICESCR, supra note 4, Art. 2(1).
3 Committee on Economic, Social and Cultural Rights, General Comment No. 3, supra note 5, at para.3. The Committee explains: ‘For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in Articles 6 to 9, legislation may also be an indispensable element for many purposes.’
4 Ibid. para.9.
5 Ibid.
6 Ibid. para.10. The Committee explains: ‘[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would be largely deprived of its raison d’être.’
7 Ibid. Bearing in mind that Article 2(1) of the ICESCR obligates state parties to take the necessary steps ‘to the maximum of its available resources’, the Committee correctly concludes: ‘In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’
judicial remedies for the enforcement of ESC rights, particularly where it is alleged that the State has failed to fulfill its obligations through non-judicial means.

3. The Justiciability of ESC Rights

A. Remedies for Vindicating ESC Rights

There appears to be broad jurisprudential consensus that ESC rights are indeed ‘rights’, which require vindication by the government within the framework of progressive realization. This brings us to the question of justiciability, and whether ESC rights should be enforceable in the courts.

Article 8 of the Universal Declaration of Human Rights (UDHR) states that ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law.’

The UDHR draws no real distinction between civil and political rights and ESC rights, thereby implying that ‘remedies’ ought to be made available in respect of both sets of rights. However, the International Covenant on Civil and Political Rights (ICCPR) in Article 2(3)(b) specifically requires States to develop the possibilities of judicial remedies, whereas no such provision is found in the ICESCR.

B. Criticisms of the Justiciability of ESC Rights

Critics of judicial remedies for vindicating ESC rights tend to argue that the need for effective remedies should not be confused with judicial remedies. These critics prefer alternatives to judicial remedies, such as administrative remedies and legislative responsiveness to public advocacy campaigns or to reports by human rights commissions. It is argued that the ‘[g]reater flexibility and responsiveness of some those techniques can be better suited than litigation for achieving the goals of [ESC rights].’ Such arguments indeed mark ‘a critical fault line in the theory and law of human rights’, since they also implicitly work towards reinforcing the

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16 See Steiner et al., supra note 2, at 313.
17 Ibid. Also see Michael J. Dennis & David P. Stewart, Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health? 98 Am J. Int’l L. (2004) 462, at 467. The authors contend: ‘The call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial processes intrinsically produce better, more insightful policy choices than, for example, their legislative counterparts.’
idea that civil and political rights are more fundamental than ESC rights. The most recurrent of such arguments are: (1) the propensity for ESC rights adjudication to undermine the democratic process, and (2) the lack of judicial competence in dealing with complex policy issues.

1. The Democratic Process

One of the principal arguments against the justiciability of ESC rights concerns the nature of the judiciary itself. It is argued that as unelected officers purportedly outside the democratic process, judges should not adjudicate on issues pertaining to the allocation of scarce resources, which is the democratic majority’s moral right.

A fervent critic of the justiciability of ESC rights, Aryeh Neier contends that by adjudicating on ESC rights, ‘we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.’ He insists that distributive justice contemplates a variety of stakeholders, all of whom ought to be consulted and made part of a wider discussion through the democratic process. Neier concludes:

[This discussion] should not be settled by some person exercising superior wisdom, who comes along as a sort of Platonic guardian and decides this is the way it ought to be. These issues ought to be debated by everyone in the democratic process, with the legislature representing the public and with the public influencing the legislature in turn. To suggest otherwise undermines the very concept of democracy by stripping from it an essential part of its role.

However compelling the above view might seem, it is still based on certain fundamental—and altogether rebuttable—presumptions relating to the effectiveness of the democratic process. It presumes that the legislative and executive organs are accountable to the general public and that these organs of government, at least generally, subscribe to the principles of good governance. However, the judiciary remains a powerful ‘counter-majoritarian’ mechanism through which checks and balances could be imposed on the legislature and executive. Thus, even if one is to concede that the judiciary ought to play only a limited role in the vindication of ESC rights, there seems to be little reason to deny the constitutionalization of ESC rights altogether. As Fabre argues, the government may be put under weaker constitutional constraints compelling the fulfillment of minimum obligations, while the judiciary may ensure that the government does indeed fulfill such obligations.

The Committee on Economic, Social and Cultural Rights deals with this issue in General Comment No.9. Though conceding that alternatives to judicial remedies are, in most cases, sufficient, the Committee too appears to insist on the

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19 Ibid.
22 Ibid. at 2.
23 Fabre, supra note 20, at 283.
24 Ibid.
availability of judicial remedies in order to deal with certain aspects of ESC rights. It endorses the following view:

[T]here are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

The author subscribes to this view in principle, since the availability of judicial remedies may be an important option, particularly where other remedies have proven to be ineffective. Yet, as discussed later in this paper, there may be certain legitimate justifications for judicial restraint when dealing with ESC rights issues.

2. Competency

Another prominent school of jurisprudential thought contends that the judiciary simply lacks the necessary resources and technical expertise to interpret and enforce ESC rights. Typically, it is argued that with superior fact-finding and reporting tools at its disposal, the legislative branch is better suited to make decisions about resource allocation. Once again, Neier subscribes to this criticism and contends that judicial intervention in ESC rights issues is highly inappropriate, since courts do not possess the requisite expertise to deal with questions of resource allocation. He concludes that it is ‘the political process that has to strike the appropriate balance on such questions.’

Notwithstanding these broad concerns, judges are now engaging in the assessment of resource allocation with increasing regularity. This is particularly evident in the United Kingdom, with respect to education, housing and health care. Furthermore, both the South African Constitutional Court and the Supreme Court of India have ‘firmly rejected the argument that [ESC] rights are categorically non-justiciable, and insisted on the interdependence between social, economic,
political, and civil rights.' The judgments delivered by these courts appear to be highly persuasive and have consistently led some governments to adjust their welfare policies. Amy Kapczynski and Jonathan M. Berger analyze the South African experience and reach the following conclusion:

‘In a series of cases that have become milestones in the global debate over socio-economic rights, the Constitutional Court has declared that such rights, as they are enshrined in the South African Constitution, are fully justiciable, and in fact that South African courts are obliged to test the constitutional adequacy of the government’s programs against these guarantees and to provide adequate remedies for all constitutional violations.’

In view of this evolving debate, it seems obvious that the traditional objections to the justiciability of ESC rights, though still relevant and somewhat compelling, have begun to wane under the pressure of recent progressive jurisprudence on the matter. Courts around the world have begun to recognize the justiciability of ESC rights, and have even displayed certain activist tendencies.

31 Amy Kapczynski & Jonathan M. Berger, supra note 18, at 53.
32 Fabre, supra note 20, at 282. The author observes: ‘This tells us two things. First, courts have not always been reluctant to adjudicate allocations of resources. Second, when they have done so, they have done so with some degree of success.’
33 Amy Kapczynski & Jonathan M. Berger, supra note 18, at 53. Also see Eric C. Christiansen, ‘Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court’, 38 Colum. Hum. Rts. L. Rev. (2007) 321, at 321. For an Indian perspective, see Olga Tellis v. Bombay Municipal Corporation [1986] AIR SC 180, where the Supreme Court of India analyzed the issue of enforcing ESC rights under the Indian Constitution. At para.33 of its judgment, the Court held: ‘Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.’
34 The Committee on Economic, Social and Cultural Rights succinctly articulates the current jurisprudential position in the following terms: ‘It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.’ See Committee on Economic, Social and Cultural Rights, General Comment No.9 (1998), UN Doc.E/1999/22, Annex IV, para.10.
4. ESC Rights in the Sri Lankan Context

The precise position in Sri Lanka on the justiciability of ESC rights is not easily ascertainable from the provisions of the Constitution. Most ESC rights find some articulation in the Directive Principles of State Policy contained in Chapter VI of the Constitution. For example, Article 27(2)(d) refers to the State’s obligation to ensure ‘the rapid development of the whole country by means of public and private economic activity…’\(^{35}\) Similarly, Article 27(2)(e) requires the State to ensure ‘the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good.’\(^{36}\) Hence, the State’s responsibility to vindicate ESC rights is rather unambiguously acknowledged by these provisions. However, the question of justiciability is later addressed in Article 29 of the Constitution. The Article declares: ‘The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.’\(^{37}\)

Thus, no case purely alleging a violation of any directive principle may be presented to the courts for adjudication. While directive principles of state policy have been referred to, and to an extent, relied on in cases such as the Eppawela case,\(^{38}\) these principles have not been officially accepted as ‘justiciable’.

It is argued that directive principles of state policy were originally developed in ‘contra-distinction’ to fundamental rights.\(^{39}\) These principles usually embody certain important ESC rights, but are often treated as inferior in status to the civil and political rights that feature in a constitution without the qualification ‘directive’.\(^{40}\) This appears to be the current position accepted by the courts in Sri Lanka.

By contrast, over the years, the Indian courts have ‘redefined the relationship between fundamental rights and directive principles.’\(^{41}\) The Indian
Supreme Court, for instance, has approached the two categories in a more integral manner, thereby affording certain directive principles the status of fundamental rights.42

Despite the official status granted to directive principles, the Sri Lankan Supreme Court has entertained contentious matters on ESC rights under the equal protection doctrine contemplated by the Chapter on Fundamental Rights in the Sri Lankan Constitution.43 The author would not go so far as to describe the present Supreme Court of Sri Lanka as ‘activist’ in respect of ESC rights. As mentioned before, any judicial intervention into the policymaking process to better enforce ESC rights may be broadly referred to as ‘activism’. This is certainly not a recurrent phenomenon in the Sri Lankan context. However, in cases such as the Waters Edge case,44 the Supreme Court’s perceived activism contained certain socioeconomic dimensions. Furthermore, there have been some isolated examples of fairly extensive judicial activism in respect of economic issues.

For example, in the Hedging case,45 the Supreme Court granted leave to proceed on the alleged infringement of the fundamental rights guaranteed by Article 12(1) of the Constitution. The case involved certain ‘hedging agreements’ entered into on behalf of Ceylon Petroleum Corporation with several banks for the purpose of protecting the Corporation from potential increases in world oil prices. However, due to the lack of any limitations on the liability of the Corporation in the event that oil prices dropped, the sudden decrease in world oil prices resulted in substantial losses to the Corporation. The Court thereafter issued an interim order suspending the operation of the hedging agreements in the public interest.46 Additionally, the Court issued an interim order declaring that the domestic oil prices were ‘excessive in terms of current world market prices and that the Government and fiscal levies imposed cannot be rationally related to the object of taxation considering that petrol is an essential item which affects the cost of living, commerce and business activities.’47 The Court thus directed the government to reduce the price of petrol to be commensurate with world oil prices. However, the government refused to comply with the order of Court, which led to a relative state of confusion in respect of petrol prices in the country.48 Though probably well-meaning, this instance of

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44 Sugathapala Mendis v. Kumarathunga, SC (F.R.) 352/07, S.C. Minutes 08.10.2008. The petitioners in this case inter alia called into question the ‘public purpose’ for which certain lands were acquired under the Land Acquisition Act No. 9 of 1950. The land had been subsequently sold to a private party for the purpose of constructing a private golf resort. A respondent in the case, the Urban Development Authority alleged that there would be several public benefits arising out of the said project, including an increase in the property value of the surrounding area. The Supreme Court, however, rejected this contention as failing to meet the criteria of ‘public purpose’ under the Act and held that the respondents had acted in contravention of the doctrine of public trust.
47 Ibid. S.C. Minutes 15.12.2008. The Court instructed the Treasury to determine a price for petrol based on a benchmark of $56.05 a barrel and government taxes of no more than 100 percent. It was found that at the current price of Rs. 122 a litre, the Ceylon Petroleum Corporation's total costs and profit margin came to Rs.48.77 a litre. The remaining Rs.73.23 comprised seven different levies. This pricing structure was deemed to potentially violate the right to equal protection of the law under Article 12(1) of the Constitution.
judicial activism in a matter that involved complex policy decisions relating to resource allocation and taxation ultimately led to the withdrawal of the petitions and a decisive moral victory to the government. Due to the withdrawal of the petitions, even the interim stay order suspending the hedging agreements ceased to operate, resulting in colossal State liability. Had the Court confined itself to issues of due process and accountability in terms of the hedging agreements and refrained from dabbling with issues directly within the purview of policymakers, i.e. the determination of the petrol prices, a more positive outcome in this case could have been possible. Hence it would not be unreasonable to argue that this instance of ‘activism’ produced counterproductive results and perhaps, even damaged the credibility of the Court.

The above experience suggests that despite a strong jurisprudential basis for judges to play a reasonable role in the fulfillment of a State’s obligations in respect of ESC rights, there are certain compelling considerations that guide the extent of this role. The next section focuses on the limits of judicial activism, particularly in respect of ESC rights issues, and examines some of the considerations that warrant judicial restraint.

5. The Bounds of Judicial Activism

There are two options available to a court when dealing with issues of ESC rights. It can either ask the State to implement welfare policies and allocate resources in such a way as to respect people’s socioeconomic rights; or it can draft policies itself and decide how resources should be allocated.\(^\text{49}\) There are compelling reasons for selecting the first option. As the author will argue in this section, judges ought to recognize the potential for counterproductive results emanating from their activism in respect of ESC rights issues. Such negative consequences include the risk of judicial decisions being ignored by policymakers, which may, in turn, lead to the loss of judicial credibility. The author will also seek to draw a clear distinction between activism concerning ESC rights and civil and political rights and argue that it is in respect of the latter set of rights that judges ought to focus their activist intentions more.

A. Queue Jumping

An important argument for exercising judicial restraint in matters of resource allocation is that activism could unfairly allow some members of society to ‘queue jump’. The concept of queue jumping refers to the phenomenon of permitting a particular segment of society to access scarce resources through means that are outside the democratic process.\(^\text{50}\) Tara Melish describes the concept as ‘the strategic

\(^{49}\) Fabre, *supra* note 20, at 281.

\(^{50}\) A number of critical legal scholars have argued that queue jumping through litigation undermines efforts at distributive justice. For example, David Kennedy argues: ‘A right or entitlement is a trump card. In emancipating itself, the right holder is, in effect queue jumping. But recognizing, implementing, and enforcing rights is
use of rights-based litigation to jump to the head of a line in accessing scarce entitlements. Tara Melish suggests that queue jumping may still be avoided through the proper crafting of remedial orders. This is not an argument for making ESC rights non-justiciable, but instead, one that calls for judges to avoid giving expression to economic entitlements, irrespective of social and financial context. Melish contends:

Avoiding the problem requires framing remedies in ways that do not privilege litigants over similarly-situated non-litigants in terms of who may access goods and services provided by the state. This is generally achieved by requiring that, where budgetary or other legitimate constraints prevent full enjoyment of rights on an immediate basis, states have reasonable rights-based plans of action and waiting lists in place to rationally establish the order of receipt of rationed goods and services by similarly situated individuals.

The varied response of courts to the issue of queue jumping may be observed in a number of jurisdictions. For example, the Constitutional Court of Colombia has actively facilitated queue jumping through its general approach to rights-based litigation. The Court has been heavily criticized for ‘consciously ignoring resource constraints in many cases where individual litigants claim that fundamental rights are imperiled due to lack of access to needed goods and services.’ By contrast, the Constitutional Court of South Africa has actively aimed to prevent queue jumping ‘by viewing individual claims for discrete remedies in the larger context of what the State is reasonably doing to ensure access to a reasonably
moving queue within a rational plan of action.\textsuperscript{57}

The South African Constitutional Court in the case of \textit{Soobramoney v. Minister of Health, KwaZulu-Natal}\textsuperscript{58} opined that it would ‘be slow to interfere with rational decisions taken in good faith by the political organs...’\textsuperscript{59} The Court held that the reality of limited resources will at times require the State to ‘adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.’\textsuperscript{60} This is a classic example of where, despite the clear justiciability of ESC rights, the Court has preferred to adopt a more cautious approach in order to avoid unnecessary queue jumping. Thus, in the context of ESC rights issues, the limits of judicial activism in relation to queue jumping may be articulated in the following terms: judges ought to entertain matters pertaining to ESC rights, but ought not to interfere with the political process where \textit{reasonable} efforts are being taken to ensure the equitable distribution of scarce resources. However, as discussed later in this paper, the judiciary may still have an extremely important role to play in the determination of what is ‘reasonable’.

\textbf{B. Trade-offs}

While queue jumping may involve different segments of society competing for the same economic interests (for example, the provision of electricity), the concept of trade-offs refers to the competition between different segments of society for the allocation of resources towards different interests (for example, the provision of electricity vs. the construction of roads). Any socioeconomic activity requiring some budgetary allocation invariably contemplates these trade-offs. Many critics argue that decisions pertaining to ESC rights often involve highly complex macroeconomic trade-offs. It is, for example, argued that more money for road development inevitably means less for health, education, or water, or food etc. Therefore, judicial activism in matters of ESC rights may pose a serious threat to the proper determination of these trade-offs. Varun Gauri offers an interesting perspective on this issue.\textsuperscript{61} He notes:

\begin{quote}
Sorting out the various claims and counterclaims in a large population is, from the rights perspective, inevitably an activity without a formula, and one that relies on judgment guided by principle...As a result of complexities like these, when making policy proposals, some rights advocates tend for the sake of simplicity to fall back on modest versions of social rights...and argue that, globally, resources are available to fulfill at
\end{quote}

\textsuperscript{57} Ib\textit{id.}

\textsuperscript{58} [(1998)] (1) SA 765 (CC) (S. Afr.).

\textsuperscript{59} \textit{Soobramoney} involved an individual with late-stage kidney failure who was in urgent need of dialysis, but who had been rejected from his local hospital because he did not satisfy the strict medical criteria being used to ration scarce time available on the hospital’s limited number of dialysis machines. The Constitutional Court ultimately held that the hospital’s guidelines limiting access were reasonable and non-discriminatory.

\textsuperscript{60} [(1998)] (1) SA 765 (CC) (S. Afr.), at para.31.

least some basic rights without having to confront the most vexing tradeoffs.\textsuperscript{62}

Hence it is evident that judges ought to limit their intervention to the more fundamental questions of ESC rights while deferring to policymakers on the more complex or ‘vexing’ trade-offs. Again, it is important to distinguish this analysis from the overarching criticism of the justiciability of ESC rights. The question of trade-offs does not altogether displace the role of the judiciary in analyzing the trade-offs made by policymakers and, where appropriate, declaring that the rights of litigants have been violated.

Furthermore, leaving the more complex trade-offs aside, the courts still need to be vigilant in evaluating the more ‘fundamental’ trade-offs made by policymakers. The author will distinguish fundamental trade-offs from complex trade-offs by referring to the nature of the compromise that each type of trade-off requires. Fundamental trade-offs invariably involve a State’s minimum core obligations in respect of ESC rights. For example, in fundamental trade-offs, the State may have to choose between large-scale development goals and certain human development goals, while in complex trade-offs, the choices lie within the details of governmental spending, budgetary plans and resource allocation. Some insist that the view that human development can be promoted only at the expense of economic growth poses a false trade-off.\textsuperscript{63} It is argued that most budgets can accommodate additional spending on human development by ‘reorienting national priorities’ and reducing military expenditure, unnecessary government controls and inefficient social subsidies.\textsuperscript{64} Governments could also improve the efficiency of social spending by formulating policies and budgetary frameworks that reallocate resources in a manner that achieves ‘a more desirable mix between various social expenditures.’\textsuperscript{65} Though it may be inappropriate for the judiciary to dictate as to how such reallocation should take place, the courts may still have a legitimate role in pointing out to the government that some reallocation is required in terms of its minimum core obligations.

This approach has found its way into practice in South Africa. In the TAC case, the petitioners contended that the Government of South Africa was violating the constitution by failing to provide a public sector programme to prevent mother-to-child transmission (‘PMTCT’) of HIV.\textsuperscript{66} It was contended that as a result of this failure, an estimated 89,000 children were born with HIV in South Africa in 1999.\textsuperscript{67} The Constitutional Court of South Africa held that the government had ‘breached the express constitutional guarantee of access to health care services, in particular

\textsuperscript{62} Ibid. at 472-473.
\textsuperscript{63} United Nations Development Programme, \textit{Human Development Report} (1990), at 4. The report further states: [This false trade-off] misstates the purpose of development and underestimates the returns on investment in health and education. These returns can be high, indeed. Private returns to primary education are as high as 43\% in Africa, 31\% in Asia and 32\% in Latin America. Social returns from female literacy are even higher—in terms of reduced fertility, reduced infant mortality, lower school dropout rates, improved family nutrition and lower population growth.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} See TAC (No.2) [2002] (5) SA 721 (CC) (S. Afr.).
\textsuperscript{67} Ibid. paras.27-39.
the State’s positive obligations in respect of that right’ by failing to develop and implement a comprehensive PMTCT programme.\footnote{Amy Kapczynski & Jonathan M. Berger, supra note 18, at 45-46.} Thus the government was directed to take certain steps to ensure access to comprehensive PMTCT services ‘without delay’.\footnote{TAC (No.2) [2002] (5) SA, at para.135.} However, the Court neither elaborated on what precise steps the government ought to take in meeting its obligations, nor sought to exercise supervisory powers over the steps ultimately taken. Instead, the Court noted that judges ‘are not institutionally equipped to make…wide-ranging factual and political enquiries.’\footnote{Ibid. para.37.} This approach perfectly illustrates the distinction between the fundamental trade-offs that courts ought to have a role in determining, and the more complex trade-offs involving resource-allocation, which courts ought not to interfere with. The court in the TAC case seems to have correctly understood this distinction and restrained itself from proceeding beyond the determination of a rights violation \textit{per se} i.e. the failure of the government to fulfill its positive obligation to allocate resources where necessary.

The Supreme Court of Sri Lanka was confronted with a difficult issue relating to trade-offs in the \textit{Southern Expressway} case.\footnote{Mundy and Others v. Central Environmental Authority and Others, SC Appeal 60/2003, S.C. Minutes 20.01.2004. The appellants claimed that the Southern Expressway Project, and more specifically the decision to realign the expressway, adversely affected their lands and that they had been denied the opportunity to be heard in relation to the determination of the alignment. It was also contended that a supplementary environmental impact assessment study should have been conducted for the change in alignment. Accordingly, the petitioners filed a writ application in the Court of Appeal, which was refused. The petitioners thereafter appealed to the Supreme Court.} In this case, Justice Mark Fernando considered the trade-off between large-scale economic development through the construction of an expressway and the immediate adverse impact of the project on the petitioners’ property rights. The views expressed by the lower court were rearticulated in the following terms:

\begin{quote}
While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation...[T]he obligation to the society as a whole must predominate over the obligation to a group of individuals, who are so unfortunately affected by the construction of the expressway.\footnote{Ibid. at p.12 of the judgment.}
\end{quote}

The Court held that the fundamental rights of the petitioners were in fact imminently infringed by the conduct of the respondents. However, it was conceded—and rightly so—that when confronted with the trade-off between large-scale economic development and the propriety rights of individuals, judicial discretion should be exercised in favour of the State.\footnote{Ibid. at p.15 of the judgment.} Accordingly, it was held that the Southern Expressway Project ought to continue as planned and that the proper and most equitable remedial intervention in such cases was to order compensation. Though Justice Fernando did not go so far as to differ to the policy-making authority of the government in matters of economic development, the analysis of the judge implied a certain level of deference. This approach is indeed facially
desirable, as it acknowledges both the complexity of certain trade-offs and the need for judicial caution when interfering with their determination. However, as discussed later in this paper, there is still some scope for judges to review the decision-making process in respect of ESC rights insofar as such decisions comply with standards of non-discrimination and reasonableness.

The notion of trade-offs may feature outside the scope of ESC rights as well. Make no mistake: judges are often called upon to determine certain crucial, and invariably complicated trade-offs in relation to civil and political rights matters. However, as the author will attempt to establish in the next section, judicial activism in this sphere is absolutely indispensable not only for the proper vindication of civil and political rights, but also for the establishment of a political framework that ensures the fulfillment of ESC rights.

C. Activism in Matters of Civil and Political Rights

A number of writers including Aryeh Neier have stressed on the importance of recognizing ‘how significant civil and political rights are in dealing with economic and social inequities.’\(^74\) The work of Amartya Sen on famine is immensely relevant to this hypothesis. Sen argues that since the end of the Second World War, no famine has occurred in countries where there was ‘democratic accountability and the ability to communicate freely.’\(^75\) He concludes that this empirical finding cannot be explained as a mere coincidence, but is in fact evidence of the positive correlation between the vindication of civil and political rights and the vindication of socioeconomic rights. Sen’s research appears to provide a sound empirical basis for the notion of ‘interdependence’, which is often insisted upon in theoretical descriptions of the two sets of rights. Hence it is crucial that judges ensure that civil and political rights are protected, respected and promoted to the greatest extent possible. Neier notes that civil and political rights ought to be fervently protected ‘not only because of their intrinsic significance, and not only because of their essential role in making the democratic process possible, but because civil and political rights, although not an ultimate solution to the unfair distribution of resources, are among the most effective ways to address social and economic injustice.’\(^76\)

It is scarcely reasonable to describe the Sri Lankan Supreme Court as ‘activist’ in matters of civil and political rights. Alluding to this fact, Jayampathy Wickramaratne argues that the Supreme Court, in fulfilling its constitutional role as protector and guarantor of fundamental rights—essentially meaning civil and political rights—’must not play the role of a neutral umpire as in the case of adversarial litigation’ but unhesitatingly exercise its wide powers to grant equitable

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\(^{74}\) Neier, *supra* note 21, at 3.


\(^{76}\) Neier, *supra* note 21, at 3.
relief. The author will refrain from digressing into a lengthy commentary on the extent to which the present Supreme Court has vindicated civil and political rights in Sri Lanka. Yet it is not unreasonable to describe the present Court as ‘conservative’ in this respect. The Court has been prepared to compromise on civil and political rights in favour of competing interests such as national security and public order—albeit in the context of a civil war—perhaps too easily. Where activism was required, and where trade-offs should not have been accepted, the Court has preferred to adopt a more deferential approach.

However, as both Neier and Sen have argued, there is a certain socioeconomic value to vindicating civil and political rights that goes well beyond the intrinsic value of these rights. The courts must appreciate that even if, for certain compelling reasons, a more cautious approach ought to be adopted in terms of ESC rights, judges ultimately play a critical constitutional role in making democracy more effective. Furthermore, judges must become active defenders of civil and political rights, such as the freedom of the press, the freedom of speech and expression and the freedom of political participation, in order to ensure that the existing political process would facilitate the equitable allocation of resources.

In light of the above, a clear analytical framework is required to define the role of judges in enforcing ESC rights. Examples from the European and South African legal systems suggest several approaches for ensuring distributive justice within a reasonable framework of judicial intervention, i.e. a framework that focuses on safeguarding the integrity of the democratic process.

D. Alternative Approaches to ESC Rights Adjudication

Two approaches have emerged in the European and South African contexts, which are perhaps the most promising in terms of enhancing distributive justice. The first approach entails an analysis of ESC rights in the context of a general principle of non-discrimination. The second approach recommends that judges apply a ‘reasonableness’ test in relation to the economic policies of the State. The resulting formula for determining the extent of judicial involvement is illustrated by the following figure.

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78 For a more in-depth discussion on the role of judges in safeguarding democratic institutions, see John Hart Ely, *Democracy and Distrust* (1981).
Judicial Activism Revisited: Reflecting on the Role of Judges

<table>
<thead>
<tr>
<th>Type of Rights / Policy Issue</th>
<th>Level of Judicial Involvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deferential</td>
<td>ESC Rights Issue / Complex Trade-offs (Non-discriminatory and reasonable trade-offs)</td>
</tr>
<tr>
<td>Vigilant</td>
<td>ESC Rights Issue / Fundamental Trade-offs (Non-discriminatory and reasonable trade-offs)</td>
</tr>
<tr>
<td>Activist</td>
<td>ESC Rights Issue / Discriminatory or Unreasonable Trade-offs. (Either complex or fundamental trade-offs)</td>
</tr>
</tbody>
</table>

**Figure 1: Formula for Determining the Proper Level of Judicial Involvement**

According to the above formula, judges should remain largely deferential in matters of ESC rights adjudication where policymakers are expected to determine complex and often ‘vexing’ trade-offs. Such trade-offs usually pertain to detailed questions of resource allocation. Where more fundamental trade-offs are concerned, judges should adopt a vigilant approach, since the minimum core obligations of States may be involved in the determination of such trade-offs. Moreover, this formula is essentially premised on the view that the political process is better suited to determining questions of resource allocation. Yet judges have an important role to play in ensuring the integrity of that political process. Hence, judges must adopt an activist approach when dealing with the civil and political rights that would ultimately ensure such integrity. Furthermore, as discussed below, in the event that the political process results in the making of discriminatory or unreasonable trade-offs, judges should—and indeed must—adopt a more activist approach, thereby intervening in the political process in order to vindicate the ESC rights concerned.

1. **The Non-Discrimination Approach**

James Cavallaro and Emily Schaffer contend that the relative advantage of using the non-discrimination principle is that the Court ‘may rely on a fundamentally civil right to expand protection of economic, social, and cultural rights.’79 In order to make effective use of this principle, the judiciary ought to focus on contentious ESC rights cases that permit an ‘expanding constructions of the idea of discrimination.’80

In *Abdulaziz, Cabales and Balkandali v. The United Kingdom*,81 the petitioners argued that the refusal to grant residence to their male spouses where similarly situated female spouses would have been granted residence violated, *inter

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79 Cavallaro & Schaffer, supra note 6, at 271.
80 Ibid.
81 1985] 7 EHRR 471. The petitioners in this case were non-native, permanent residents of the United Kingdom and sought to question distinctions in British immigration law that effectively denied the right of entry to their male spouses in circumstances in which female spouses would have been granted residence. Each of the petitioners lawfully resided in the United Kingdom and had sought permission for her husband to join her in residence. In each case, immigration authorities denied such permission.
alia, Article 14 of the European Convention of Human Rights. The European Court of Human Rights (ECtHR) upheld the petitioners’ claim despite the government’s contention that there was a rational basis for the said discrimination i.e. evidence that male immigrants were more likely to seek work than female immigrants. Cavallaro and Schaffer cite this case as a clear example of when the court may rely on the principle of non-discrimination to intervene in matters of socioeconomic policy. Similarly, in Schuler-Zgraggen v. Switzerland, the ECtHR sought to apply the principle of non-discrimination in reviewing the denial of unemployment benefits to a married woman with a two-year old child on the grounds that she was unlikely to seek work outside her home. It was presumed that a childless man, by contrast, would have been afforded the same unemployment benefits. The Court held that the policy violated the non-discrimination clause of Article 14 of the European Convention and explicitly held that ‘economic rights that would not otherwise be protected by the Convention would be guaranteed against discriminatory application.’

It is submitted that the Sri Lankan courts should adopt a similar approach to adjudicating ESC rights issues. By structuring the scope of judicial intervention around the principle of non-discrimination, the Court may be able to avoid contending with resource-related policy decisions or queue jumping, since, in effect, the Court would be espousing the cause of those that are unfairly placed at the end of the queue, or those who have been unfairly discriminated against due to some trade-off. Judicial activism to combat invidious discrimination in matters of ESC rights is therefore wholly justified.

2. The Reasonableness Approach

In the case of Government of the Republic of South Africa and Others v. Grootboom and Others, members of an informal ‘squatter’ settlement facing eviction sought to sue the government under, inter alia, Section 26 of the South African Constitution, which provides for the right to housing. The Constitutional Court of South Africa unanimously held against the government and established that the

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82 The Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, Art.14. Article 14 states: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
83 See Cavallaro & Schaffer, supra note 6, at 257.
84 [1993] EHRR 405.
85 See Cavallaro & Schaffer, supra note 6, at 257.
86 [2001] (1) SA 46 (CC) (S. Afr.).
87 Constitution of the Republic of South Africa (1996), s.26. The relevant subsections read as follows: (1) Everyone has the right to have access to adequate housing. (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
socioeconomic rights under the South African Constitution are clearly justiciable.\textsuperscript{88} Importantly, the Court also recognized that the doctrine of ‘reasonableness’ is the basic pivot upon which the inquiry in a socioeconomic rights case ought to proceed. It was opined that judges should determine simply ‘whether the measures taken by the state to realize the right . . . are reasonable in the circumstances.’\textsuperscript{89} The Court also held that the fulfillment of the minimum core of any given socioeconomic right is potentially relevant ‘in determining whether measures adopted by the State are reasonable.’\textsuperscript{90} The Court in the TAC case endorsed this view when it considered the reasonableness of the government’s refusal to provide PMTCT treatment to pregnant women with HIV. Thus the failure to provide a minimum set of benefits in a particular context may indeed constitute unreasonable—and thus unconstitutional—conduct.\textsuperscript{91}

It is clear from the above analysis of Grootboom that judges may legitimately engage the government on ESC rights issues where the trade-offs preferred by the government are manifestly unreasonable. The formula illustrated in Figure 1 above suggests that judges should adopt a vigilant approach when dealing with fundamental trade-offs i.e. decisions that pertain to the minimum core of any socioeconomic right. In doing so, it is justifiable for judges to conclude that the government’s failure to allocate adequate resources to meet at least this minimum core is ‘unreasonable’. In circumstances where such an unreasonable trade-off is detected, judicial intervention into the political process to ensure the enforcement of the ESC right concerned may be appropriate.

Fortunately, the doctrine of reasonableness has found its way into the equal protection jurisprudence of Sri Lanka. In Wickremasinghe v. Ceylon Petroleum Corporation and Others,\textsuperscript{92} Chief Justice Sarath N. Silva held that the essence of the basic standard under the equal protection doctrine was to ensure reasonableness.\textsuperscript{93} The proper position under the law was articulated in the following terms: ‘If the legislation or the executive or administrative action in question is thus reasonable and not arbitrary, it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality.’\textsuperscript{94}

As there appears to be some scope for the application of the reasonableness standard in Sri Lanka, it is submitted that this standard too may guide the extent of judicial activism in enforcing ESC rights. While it may be inappropriate for judges to dictate the manner in which democratically elected representatives should

\textsuperscript{88} [2001] (1) SA 46 (CC) (S. Afr.), at para.20. It was held: ‘The question is . . . not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.’

\textsuperscript{89} Ibid. para.33.

\textsuperscript{90} Ibid.

\textsuperscript{91} See N v Government of Republic of South Africa (No.1) [2006] (6) SA 543 (D). In this case, the failure to provide prisoners at a particular facility with access to antiretroviral treatment was held to be unreasonable, and therefore unconstitutional.

\textsuperscript{92} [2001] 2 Sri. L.R. 409. The petitioner in this case entered into an agreement with the Corporation for a dealership in petroleum products. However, the Corporation terminated the agreement without any reasonable grounds. The Supreme Court held that the impugned termination of the petitioner’s dealership infringed his rights under Article 12(1) of the Constitution; hence such termination was invalid and of no force in law.

\textsuperscript{93} Ibid. at 414.

\textsuperscript{94} Ibid.
determine trade-offs, there seems to be a legitimate basis for judges to comment on the reasonableness of those trade-offs. Where a trade-off is deemed ‘unreasonable’, the court may direct the policymaker to return to the drawing board and formulate a more reasonable policy. This seems to be the preferred method in South Africa and is recommended for replication by the courts in Sri Lanka.

6. Conclusion

In this paper, the author attempted to evaluate the role of the judiciary in vindicating ESC rights. While there is no doubt that ESC rights are justiciable, the precise extent to which judges should be ‘activist’ in promoting these rights is contingent on certain other crucial factors. This approach to judicial activism should be contrasted with the more extensive activism that is required of judges in the realm of civil and political rights. Advocating ESC rights in Sri Lanka simply cannot be meaningful and would arguably be vacuous unless issues of disenfranchisement, political marginalization and media freedom are appropriately addressed. The judiciary has a critical role to play in safeguarding these civil and political rights, not only for their intrinsic value, but also because the promotion of these rights would eventually lead to greater distributive justice.

When dealing with the enforcement of ESC rights, however, concerns relating to queue jumping and trade-offs ought to enter into the judicial consciousness, as complex questions of resource allocation are better answered through the political process. Despite these constraints, there is still a limited scope for judicial intervention in socioeconomic matters under the principles of non-discrimination and reasonableness. It is therefore submitted that judges ought to intervene where the policies adopted, or the trade-offs made, are either discriminatory or unreasonable.

Hence it is crucial that the courts in Sri Lanka appropriately confront the complexities involved in the enforcement of ESC rights and approach this issue on a case-by-case basis. The potential for the same court to be fervently ‘activist’ in matters of civil and political rights and cautiously ‘vigilant’ in matters of ESC rights is certainly evident from the jurisprudential analysis undertaken above. It is through this interface between the political process and the judiciary that the interests of socioeconomic development and distributive justice are best served.